IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 719 of 1991

Vasudeo Bhagwan Landage .. Appellant]
(Orig. Defendant)

V/s

Barshi Nagarpalika .. Respondents

Ms A.R.S.Baxi for Apellant

None present for Respondent

CORAM:S.R.SATHE,J.

DATED:28th April 2006

ORAL JUDGMENT :-

1. The Appellant, original defendant in Regular Civil Suit No.460 of 1980 has preferred this Appeal against the judgment and order passed by the Court of 6th Additional District Judge, Solapur whereby, the judgment and order directing the defendant to deliver the vacant possession of the suit plot to the plaintiff- Municipal Council was confirmed and appeal was dismissed. For the sake of

convenience, hereafter, parties shall be referred to as the plaintiff Municipal Council and the defendant.

2. The brief facts giving rise to this appeal are as under:

. The suit plot admeasuring 15.6" x 8.,4" situated behind School no.9 near Kot Wall, Shivaji Road, Barshi is given to defendant by plaintiff Municipal Council on the basis of leave and licence. The defendant carried out construction on the said plot and thereafter filed a suit bearing Suit NO.459 of 1979 for permanent injunction against Municipal Council restraining them from taking possession of the said property. As the defendant was unauthorizedly using the said plot and was not paying any amount and thereby causing loss to plaintiff Municipal Council they filed Regular Civil Suit NO.460 of 980 in the court of Joint Civil Judge, J.D., Barsi for possession of the suit plot from the defendant as well as for damages at the rate of Rs.30/- per month from 1-1-1978 till filing of the suit and also claimed Rs.930/- by way of penal charges.

3. The defendant filed his written statement at exh.12 and contended that the plaintiff has no locus standi to file the present suit. He also contended that standing committee of the plaintiff Municipal council has not

passed Resolution No.44 as alleged by the plaintiff and as such the suit is not tenable. He also denied plaintiff's allegation that he has carried out any unauthorised construction on the suit plot. He therefore contended that the plaintiff is not entitled to recover any amount from him.

4. The defendant further contended that after obtaining oral permission from the members of the plaintiff Municipal Council he started his shop on the suit plot. He had also submitted that regular application for securing the suit plot on rental basis. However the plaintiff Municipal Council did not inform him anything about the same. He had sent rent by M.Os to plaintiff but plaintiff refused the same. According to him plaintiff even issued licence to him under Shops Act and thus the plaintiff Municipal council and its officers were knowing about the suit shop and as such they are stopped from taking possession of the same on the ground that it is unauthorised. The defendant further contended that by this resolution on 29-11-1980 the plaintiff Municipal council has in fact admitted his tenancy rights and as such now the plaintiff is not entitled to claim possession of the suit plot. The defendant alternatively contended that the suit plot is not owned by the plaintiff Municipal council but it is owned by the Maharashtra Government and as such plaintiff has no locus

standi to file the present suit. Hence on all these grounds the defendant prayed for dismissal of the suit.

5. On these pleadings the learned trial Judge framed issue on Exh.13. In order to prove the suit claim on behalf of the plaintiff their Municipal Engineer Arun Shah had examined at Exh.83 as against this the defendant examined himself on Exh.84 and witness by one Kukke at Exh.87. The defendant also produced certain documents. After considering the evidence on record the learned trial Judge came to the conclusion that though the plaintiff is not owner of the suit plot the same has been given to plaintiff by Maharashtra Government for their use and plaintiff has not proved that the defendant took the said plot on the basis of leave and licence. The trial Court also negatived the defendant's contention that he is tenant in respect of the suit premises. According to the learned trial Judge the plaintiff is having a better possessory title as per provisions of Section 6 of the Specific Relief Act, plaintiff is entitled to get the possession. He therefore decreed the suit in plaintiff's favour.

6. Being aggrieved by the said order the original defendant filed First Appeal bearing NO.368 of 1988 in District Court, Solapur. After hearing arguments of both the learned Advocates the learned first Appellate Court

came to the conclusion that finding recorded by the trial Court that plaintiff is entitled to get possession under Section 6 of the Specific Relief Act is not correct and there were in fact no pleadings to that effect. According to the learned Additional District Judge, the plaintiff has proved that the defendant is a trespasser and as such plaintiff is entitled for possession of the suit plot from the defendant. He therefore confirmed the decree for possession passed against defendant.

7. The above mentioned order of the learned 6th Additional District Judge is challenged in the present Second Appeal. While admitting the appeal, this Court (Coram: Agarwal J.) has passed the following order.

. "Admit on grounds 8 to 10".

. The said grounds are as under :-

(8) The Court below ought to have considered that Resolution at Exhibit 89 regularised the tenancy of the other tenants who are in the same category of the Appellant, but it was denied to the Appellant as the letter from the Government to the Respondent. Therefore, it is submitted that it will be clearly discrimination under Article 14 of the Constitution

of India.

(9) The Court below has failed to consider that in the evidence the Respondent has put-up the case of encroachment which is contrary to their pleadings.

(10) The Court below has failed to consider that the application of the Appellant regarding regularization of tenancy was still pending and no order was passed since last two years.

8. At the outset it must be mentioned that the Respondent original plaintiff Barshi Municipal Council has not appeared in this appeal though duly served and as such this second appeal has proceeded exparte against the Respondent.

9. Ms Baxi, learned Advocate for the Appellant defendant has urged only two points. Firstly, she submitted that evidence adduced by the plaintiff Municipal Council is against the pleadings and the First Appellate Court has wrongly held that the defendant is trespasser. Secondly, she canvassed before me that plaintiff Municipal Council has in fact passed one Resolution Exh.89 on 29-11-1980 whereby they have in fact regularised all the alleged encroachments made by the different shop keepers on the road where the suit property is situated. However merely

because the defendant had filed a suit against the plaintiff Municipal Council they did not regularise the same against the present defendant. She therefore submitted that in view of the said resolution also plaintiff is not entitled to get possession of the suit plot from the defendant. She therefore submitted that the appeal be dismissed.

10. At the outset it must be mentioned that in the plaint plaintiff had averred that the defendant has taken possession of the suit plot as leave and license and thereafter he carried out construction on the same unauthorisedly and illegally. Plaintiff municipal council therefore asked for possession of the suit plot. However, at the time of trial the plaintiff's witness Shah, Engineer working in plaintiff municipal council has stated that the defendant has made an encroachment on the public road and as such plaintiff is entitled for possession. As regards this the defendant contended that the suit plot was given to him by oral directions as a tenant. The fact that the defendant is having his shop on the suit plot since the year 1978 or thereabout is in fact admitted. It is also very clear that the said shop is abutting the road. It is needless to say that if it is the case of the plaintiff that the defendant has made an encroachment on a public road then it is in fact very essential for the plaintiff to adduce cogent evidence in

that behalf. However, besides the bare word of the plaintiff's witness there is no other evidence. It is pertinent to note that even the trial Court has recorded a finding that the plaintiff is not the owner of the suit plot. The suit plot is owned by State Government and State Government has given the same to the plaintiff municipal council for the purpose of having office for vaccination. The trial Court therefore held that the plaintiff municipal council was in possession of the suit plot and if the defendant has made an encroachment on the same then by virtue of the provisions of section 6 of the Specific Relief Act the plaintiff is entitled for possession. However, the appellate court held that finding recorded by the trial court with regard to the application of provision of section 6 of Specific Relief Act is wrong and held that the defendant is a trespasser and as such the plaintiff is entitled. Thus we find that both the courts below have ultimately granted decree for possession in favour of the plaintiff municipal council but on different grounds.

11. It is needless to say that the plaintiff must stand or fall on his own pleadings and evidence. In the instant case the plaintiff has in fact averred in the plaint that the defendant took possession of the suit plot admeasuring 13.6" x 8.4" on leave and license basis. When such is the position, how the plaintiff's witness

can say that defendant has made an encroachment on the suit plot. What is more to be noted is that it is not even the case of the plaintiff municipal council that they issued any notice to the defendant and revoked his license. Nor it is the case that particular portion was allotted to him as a leave and licensee and thereafter the defendant made some further encroachment on the said plot. Once the plaintiff had come out with the case that the suit plot was given on the basis of leave and license, in the absence of any other specific pleadings and evidence it cannot be held that the defendant is a trespasser or that he has made an encroachment on the plaintiff's property. His entry on the suit plot is definitely with permission and there is nothing on record to show that the said permission has been cancelled or revoked.

12. It is the case of the plaintiff municipal council that the defendant has constructed a shed on the suit plot unauthorisedly without obtaining permission from the municipal council. The defendant has tried to show that he has constructed the said shop with permission of plaintiff municipal council. However admittedly he has not brought any evidence worth the name even to show that he had made an application to municipal council for carrying out construction of the said shop. Plaintiff's witness has also stated that defendant never sought any

permission for carrying out construction of the suit shop on the suit plot. So under such circumstances it does appear that construction of the suit shop is carried out without obtaining necessary permission as required by the provisions of Maharashtra Municipalities Nagar Panchayat and Township Act 1965.

13. It is the contention of the defendant that suit shop is situated hardly at a distance of about 200 ft. from municipal council which is seen by the office bearers and and employees of plaintiff municipal council while passing by the said road. The construction of shop was going on for a period of about 1 or 2 months. So, all of them were aware about the construction that was being carried out by the defendant. Even then nobody took any objection at that time and as such the plaintiff municipal council is estopped from filing the present suit. Merely because some of the employees and officers of the plaintiff municipal council used to pass by the side of the suit shop one cannot jump to the conclusion that they had full knowledge as to whether the defendant was carrying out the construction with permission or without permission or that their inaction amounts to their implied consent for the said construction or that they had waived their right. By no stretch of imagination it can be said that plaintiff municipal council is estopped from raising any grievance in that

behalf. Hence there is no substance in this contention taken by the defendant in this behalf.

14. The question arises whether merely because the defendant has carried out the construction of suit shop without the permission of plaintiff municipal council, the municipal council is entitled for possession of the suit plot.Firstly, it must be noted that plaintiff has nowhere stated as to what were the terms and conditions of leave and license. The question may also arise, as to for what purpose the suit plot was given to the defendant. However, unfortunately the plaintiff has not adduced any evidence in this behalf but merely averred in the plaint that suit plot was taken on the basis of leave and license. Even if we assume for the sake of argument that defendants' construction is unauthorised and illegal and the same has been carried out without obtaining necessary permission as contemplated under municipal council Act still then that by itself is not sufficient to evict the defendant from the suit plot and pass a decree against him. It is needless to say that as per the provisions of Section 189 of Maharashtra Municipal Council Nagarpanchayat and Industrial Township Act 1965, if unauthorised and illegal construction has been carried out by any person then it is necessary for the municipal council to follow proper procedure and even issue notice to such person. Admittedly, in the instant case there is

nothing on record to show that the notice under Section 189 was issued by Municipal Council to the defendant. So, when such is the position, the plaintiff is not entitled to get possession from the defendant. So, I think that both the courts below have in fact wrongly held that the defendant has made construction by making an encroachment on the plaintiff's property. They lost sight of the fact that the plaintiff had in fact come out with a specific case that the suit plot was taken by the defendant on leave and license basis.

15. Incidentally, it must be noted that though the defendant has taken the contention that suit plot was leased out to him by Chief Officer and some other persons, the defendant has even named those persons in his evidence. However, admittedly, he has not examined the Chief Officer or any other person who was legally authorised to lease out the property of municipality. It is an admitted fact that no document of rent note was executed between plaintiff and defendant. On the contrary it has come on record that when defendant sent money order of Rs.30/- per month, the same was rejected by the plaintiff. So, it cannot be said that the suit property was leased out to the defendant. No doubt the defendant has witness by name Kule who has stated that officers of plaintiff council leased out the suit property to the defendant. His evidence is of no use,

because he could not give any evidence about any conditions of lease and he had deposed in favour of the defendant just to oblige him. The defendant as well as his witness have in fact admitted that when any municipal council property is to be leased out then it is necessary to execute the lease deed. In the instant case such lease deed is not executed. So, it is very clear that defendant has failed to prove that he is a tenant in respect of the suit premises. Still then that by itself would not lead us to conclusion that the defendant is an encroacher or trespasser as plaintiff himself has averred in the plaint that the defendant took the suit plot on leave and license basis. Thus, it is crystal clear that there is variance in the pleadings and evidence of plaintiff. Naturally, the evidence contrary to the pleadings cannot be considered and accepted. So, I am not inclined to hold that the plaintiff has proved that the defendant has made an encroachment on plaintiff's property.

16. It is the contention of the defendant that the plaintiff municipal council has in fact even regularised all encroachments which are on the road, by passing resolution on 29-11-1980. Certified copy of the said resolution is also produced by the defendant at Exh.89. From perusal of the said resolution it is crystal clear that the plaintiff municipal council decided to

regularise all such encroachments on public road and on the portion adjoining to the tar road. Not only that, but also fixed amount that was to be accepted by way of rent. It is also mentioned in the said resolution that direction was even given for issuing receipt of the amount. It is the contention of the defendant that though he made such application for regularising his construction the plaintiff did not even consider the same and that is only because he had filed a suit NO.459 of 1979 against plaintiff municipal council wherein he had insisted that plaintiff municipal council be restrained from unauthorisedly taking possession of the suit shop. However, the said suit was dismissed for default. In my opinion mere dismissal of the said suit will also not give any right to plaintiff municipal council to take possession, particularly on the ground that the defendant has made an encroachment. The plaintiff's witness Shah has stated that the plaintiff municipal council has passed such resolution but suit shop is situated not on the road to which the said resolution is applicable. However, if we carefully read column no.3 of the said resolution then it appears that by the said resolution the plaintiff municipal council has in fact regularised all stalls (taparis) and not only the stalls or taparis situated on a particular road. In fact all taparis adjoining the tar road as well as other have been regularised. It may be argued that the defendant's suit

shop cannot be called as "tapri" because it is constructed in brick wall. However that by itself is not sufficient to hold that resolution passed on 29-11-1980 is not applicable to the defendant.

17. Having regard top all these facts and circumstances and the evidence on record I am of the view that both the courts below have wrongly passed decree for eviction against the defendant and it is necessary to set aside the same.

18. It appears that first appellate court has passed a decree for mesne profits at the rate of Rs.30/- per month from 1-1-1978 to 31-7-1980 and to that extent allowed the cross objection Exh.60. However, once it is said that defendant is not a trespasser and has not made encroachment, the question of past mesne profits does not arise. However, it must be noted that according to the defendant, he was to pay Rs.30/- per month to plaintiff municipal council for the said plot. The plaintiff has also claimed the damages at the rate of Rs.30/- per month. So, considering this fact defendant can be directed to pay the amount of Rs.30/- per month for the period from 1-1-1978 to 31-7-2000. Hence I pass the following order :-

ORDER

i. The appeal is partly allowed.

ii. The decree for possession of the suit plot passed against the defendant by the Courts below is set aside. Plaintiff’s suit for possession is dismissed.

iii. The defendant to pay plaintiff amount at the rate of Rs.30/- per month for the period from 1-7-1978 to 31-7-2000.

. Under the circumstances of the case parties to bear their own costs.

(S.R.SATHE,J.)